

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4430 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

PRANJIVANBHAI P DHIMMAR

Versus

STATE OF GUJARAT

Appearance:

MR GIRISH PATEL for Petitioner

MR HL JANI for Respondent

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 09/05/97

C.A.V. JUDGEMENT

1. The petitioner, Under Secretary in the Secretariat of the State of Gujarat, filed this petition and prayer has been made for the direction to the respondent to give him the promotion on the post of Deputy Secretary with all the consequential benefits which follow therefrom. This promotion has been prayed from the date on which his juniors were promoted.

2. The facts of the case, in brief, are that on 10th November, 1955, the petitioner joined as a Junior Assistant in the Secretariat subordinate service after selection by the Bombay Public Service Commission. On formation of the State of Gujarat in May, 1960, the petitioner was allotted to the Gujarat state. Later on the cadre of Junior Assistants became a common cadre of Assistants. With effect from 3rd November, 1978, the petitioner was promoted as Under Secretary. Under the notification dated 11-1-1983, the persons junior to the petitioner named in para No.8 of this Special Civil Application were promoted to the post of Deputy Secretary. Again under the notifications 24th June, 1983 and 2nd July, 1983, some other juniors were promoted to the post of Deputy Secretary. The supersession of the petitioner in the promotion to the post of Deputy Secretary gave a cause to the petitioner for filing of this Special Civil Application.

3. The reply to the Special Civil Application has been filed by the respondents and the respondents have come up with a case that the petitioner was given promotion in officiating capacity on 3-11-1978 on the post of Under Secretary. This promotion has been given as he was brought on the conditional list for promotion to the post of Under Secretary. As per the Government resolution, name of a person, who is included in the conditional select list has thereafter to be included in the unconditional list of Under Secretaries for the purpose of his being considered for promotion to the next higher post of the Deputy Secretary. The case of the petitioner for bringing his name in unconditional list of Under Secretaries was considered by the Departmental Promotion Committee on 14-6-1982 when his confidential record ending 31st March, 1981 was considered along with the case of others in respect of the same period. The Departmental Promotion Committee, having regard to the confidential record of the petitioner, did not consider the petitioner fit for including his name in the unconditional list and it is under these conditions that the case of the petitioner for being considered for promotion to the post of Deputy Secretary cannot be considered till his name is included in the unconditional list of Under Secretaries. It has further been stated by the respondents that the adverse remarks were duly communicated to the petitioner at the relevant time against which the petitioner had made representation. His representation was also considered by the Government and the same was turned down.

4. The petitioner has given out that the adverse

remarks in his confidential report for the period from 1-8-1979 to 31-3-1980 communicated to him vide memo dated 24th April, 1984. Similarly, the adverse remarks in his confidential report for the period from 1-4-1980 to 31-3-1981 were communicated to him vide memo dated 6th June, 1981. The petitioner has further admitted that the representations filed by him against those adverse remarks have also been rejected.

5. The counsel for the petitioner contended that the petitioner during his service tenure had performed his duties honestly, efficiently and promptly to the full satisfaction of all his superiors in different departments and there was no occasion for adverse observations. In the confidential report for the period from July, 1979 to March, 1980, it has been observed that as Under Secretary his ability to take initiative and finding solutions to problems is good and his relations with superior Officers and subordinates are cordial, but it has been observed that "it is necessary to show the special readiness to shoulder responsibility" and it has been termed as a adverse remark. The counsel for the petitioner further contended that in case, the memo dated 24th April, 1980 is read as a whole, then the remarks aforesaid may not be adverse remarks. Otherwise also, there was no occasion on which the petitioner has avoided to shoulder responsibility. The remarks were also self-contradictory as a person having ability to take initiative and find solutions to problems cannot be said to have failed to shoulder legitimate responsibility. In the representation, the petitioner requested the department to give details about the occasions which lead to the said adverse observations. It has next been contended that it is one of the important responsibility of the reporting officer to record such failings in the ephemeral rolls with a brief note of the evidence or a reference to the relevant case and these should be taken into consideration when writing the annual confidential reports. Reference in this respect has been made to the Government resolution dated 8th March, 1969. The information sought by the petitioner has been denied adding therein that the said information cannot be supplied at that stage. So far as the adverse remarks given for the year 1980-81 are concerned, the counsel for the petitioner contended that during that period more work and responsibility were entrusted to the petitioner and there was better performance and the remarks were that the petitioner had good capacity for prompt and ripe decisions and that the petitioner had good ability of administration and taking work from the subordinates. Against this further contradictory adverse remarks were

made stating that the petitioner had not sufficient capacity and clarity in thought and expression in writing as also in taking initiative and readiness in shouldering responsibility. So the reporting officer had again after appreciating the ability and merits, passed adverse remarks which are self-contradictory. It has further been contended that the petitioner was not given at any point of time, pointing out his defect or lacking in performance of duties in writing nor he has been given any opportunity to improve his work. No positive instances have been given out of the adverse remarks. The adverse remarks could have been recorded only after giving the petitioner sufficient opportunity to improve his work, and not otherwise. In support of his contention, the counsel for the petitioner placed reliance on the two decisions of the Supreme Court in the case of Sukhdeo vs. Commissioner, Amravati Division reported in 1996(5) SCC 103 and in the case of State Bank of India vs. Kashinath Kher reported in 1996(8) SCC 762.

6. On the other hand, the counsel for the respondent Shri H.L. Jani contended that the criteria for promotion to the post of Deputy Secretary is proved merit and efficiency and even if these remarks are excluded, the petitioner may still not be entitled for promotion. In the criteria for promotion of proved merit and efficiency, comparative merits of the eligible candidates have to be considered and even if the petitioner has average service record, he may not have preferential claim of promotion qua his juniors who have comparative meritorious service record.

7. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties. The petitioner against the adverse remarks communicated to him vide memo dated 24th April, 1980 filed a representation and he demanded specifically to show the instances where he failed to show his eagerness to shoulder the responsibility. The respondents have not furnished that information only on the ground that at this stage, the same cannot be furnished. In reply to the Special Civil Application, the respondents have not come up with a case that at any point of time, the petitioner has failed to show his eagerness to shoulder the responsibility. The question of eagerness to shoulder the responsibility will arise only where it is necessary and secondly where at any point of time he has denied to shoulder the responsibility or given excuses to shoulder the responsibility. If we go by the memo as a whole then it reflects that remaining part of the record of the petitioner is that his ability to take initiative

and finding solutions to problems is good and his relations with his colleagues are good and his character and conduct are also good. The para No.3 of the memo gives out that the remarks were stated to be deficiencies and those have been communicated to bring to his notice so that he may take positive steps to change. When the initiative and understanding as well as relations with the colleagues of the petitioners are good, how far the said remarks (deficiencies) can be said to be of any justification. If we read the remarks (deficiencies) in the light of the overall assessment made of the petitioner's working then certainly the remarks may be self-contradictory. Over and above, at no point of time the petitioner has been called upon to show where he has failed to show eagerness to shoulder responsibility. As observed by the Hon'ble Supreme Court in the cases cited by the counsel for the petitioner before recording of the adverse remarks it is utmost necessary on the part of a reporting or recording officer to point out the deficiency or defect or lacking in the performance of duty of the petitioner and he should have been given a reasonable opportunity for improving of his working with reference to correcting the deficiency, defect as pointed out, and only after giving him the sufficient opportunity to improve the deficiency, defect and lacking as well as giving him the proper guidance to overcome the deficiency, defect or lacking then only the remarks could have been given, and not otherwise. In reply to the Special Civil Application, the respondents have not come up with a case that at any point of time prior to 31st March, 1980, the petitioner has been ever pointed out his aforesaid deficiency, orally or in writing, and further it is not the case of the respondents that he has been given any opportunity thereafter to improve and overcome this deficiency and further he has been provided sufficient opportunity and guidance to overcome the said deficiency. The respondents, on one hand, have failed to discharge its obligation which was necessary to be followed and complied with as it has been held by the Apex Court in the cases cited by the counsel for the petitioner. So on the merits as well as on the ground aforesaid, the adverse remarks communicated to the petitioner vide memo dated 24th April, 1980, could not have been taken to be adverse remarks for adjudging his suitability for promotion to the post of Deputy Secretary.

8. The next now comes the remarks for the year 1980-81 communicated to the petitioner vide memo dated 6th June, 1981. The first remark is that the clear thinking and writing of the petitioner is not adequate

and second remark is that his initiative, understanding and readiness to shoulder responsibility, not adequate. It has next been mentioned in this memo against the column "details about any warning given or any disciplinary action - sometimes orally told". The remaining part of the memo is that overall ability and capacity to extract work from subordinates, of the petitioner was reported to be good. Similarly, the capacity to take quick and mature decisions by the petitioner were also reported to be good. When the petitioner has potential organising ability and capacity to extract the work from subordinates and further capacity to take quick and mature decision to be good, how far this remark that he is lacking in clear thinking in writing is not adequate, is justified. In fact, this remark if we read with the remaining part of the report clearly comes out to be self-contradictory. So far as the second remark regarding initiative, understanding and readiness to shoulder responsibility is concerned, it is suffice to say that this remark is identical to the remark given in the earlier part. When the officer has an ability in organising and the capacity to extract work from the subordinates and capacity to take quick and mature decisions and relations with colleagues and superiors are good, how far this remark can be said to be justified. Moreover, in the absence of any positive instances of lacking initiative, understanding and readiness to shoulder responsibility, these remarks are nothing but only vague and indefinite remarks. Moreover, though in the memo dated 6th June, 1981, it has been mentioned that sometimes he has been orally told, but that statement in the light of the remaining report of the petitioner are difficult to be accepted. Moreover, for the similar remarks in the earlier year, the petitioner was never pointed out by the respondent of his deficiency, defect and lacking, and as such, it is difficult to believe that the respondent might have undertaken that requirement and obligation for the year 1980-81. Moreover, if we go by column No.3 of the memo dated 6th June, 1981, it pertains to details about any warning given or any disciplinary action taken. How far it can be said that these remarks orally told relates to an adverse remark. There may be some positive, cogent and satisfactory evidence on the record that the petitioner has been pointed out orally his deficiency, defect and lacking and he has been given sufficient opportunity and a helping hand to overcome the same. In the absence of that material, it is not safe and justified to rely on a vague statement. However, the respondent has not given out the details on which date the petitioner was pointed out his deficiency, defect and

lacking in his working and by whom. The period is from 1st April, 1980 to 31st March, 1981. This petition has been filed in the year 1983 and the reply has been filed though in the year 1983, but nothing has been said in the reply regarding the obligation of the respondent to point out the deficiency, defect and lacking in the performance of the petitioner before recording the adverse remarks. So the adverse remarks for the year 1980-81 also could not have been taken to be the adverse remarks in the present case.

9. Taking into consideration the totality of the facts of this case, the interest of justice will be served in case this matter is sent back to the respondent to consider it afresh after excluding the adverse remarks communicated to the petitioner vide memos dated 24th April, 1980 and 6th June, 1981, and to place the matter for consideration to bring his name in unconditional list of Under Secretaries before the Departmental Promotion Committee. As the petitioner has already retired from the services during the pendency of this Special Civil Application, the respondent, the State of Gujarat through the Chief Secretary is directed to undertake this exercise within a period of four months from the date of receipt of writ of this order from this court. In case, the name of the petitioner is brought on the unconditional list of Under Secretaries then he shall be entitled for all the consequential benefits which follow therefrom i.e. he should be given the promotion from deemed date with all the consequential benefits and those should given to the petitioner within a period of four months next thereafter. In case, still the matter for bringing his name in the unconditional list does not found favour with the Departmental Promotion Committee then the petitioner may be informed accordingly by a registered letter. Rule is made absolute accordingly.

zgs/-